



## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Part 875

### RIN 3206-AO21

#### **Enhancing Stability and Flexibility for the Federal Long Term Care Insurance Program (FLTCIP)—Abbreviated Underwriting, Applications for FLTCIP Coverage, and Technical Corrections**

**AGENCY:** Office of Personnel Management.

**ACTION:** Final rule.

**SUMMARY:** The Office of Personnel Management (OPM) is issuing a final regulation to support enhancing stability and flexibility in FLTCIP by amending when abbreviated underwriting will be offered to prospective enrollees and finalizing rules for the suspension of applications for coverage and the requirements around any such suspension periods. OPM is also finalizing technical corrections for the sake of clarity and to remove redundancies. This final rule adopts the proposed regulations with one technical change correcting the provision related to the Federal appeals board that is delegated the authority to resolve contract disputes between the Carrier and OPM. Finally, OPM may effectuate a suspension period after publication of this final rule with a separate document in the Federal Register.

**DATES:** Effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. OPM will publish a separate document announcing the effective date of a suspension period in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Dyan Dyttmer, Senior Policy Analyst, [dyan.dyttmer@opm.gov](mailto:dyan.dyttmer@opm.gov), (202) 936-0152.

**SUPPLEMENTARY INFORMATION:** On June 3, 2022, OPM published proposed regulations (87 FR 33653), which proposed amendments to 5 CFR part 875 to support FLTCIP stability and flexibility by amending when abbreviated underwriting will be offered to prospective enrollees and proposing rules for the suspension of applications for coverage and the

requirements around any such suspension periods. OPM also proposed technical corrections for the sake of clarity and to remove redundancies. Finally, with the publication of the proposed rule, OPM provided notice of an anticipated suspension period.

The comment period for the proposed rule closed on July 5, 2022. OPM received three comments from individuals on the proposed rule, and a Federal appeals board contacted us regarding OPM's delegation of authority to resolve contract disputes in 5 CFR 875.109. A summary of the comments OPM received follows, along with our responses to the comments and a technical change OPM is making to the final rule in response to the comments.

### **Responses to Comments on the Proposed Rule**

One commenter questioned OPM's authority to authorize a suspension period and to change the 60-day abbreviated underwriting period allowed to newly eligible active workforce members and spouses. The commenter asserted that OPM lacked authority to suspend applications based on the statutory language in 5 U.S.C. 9002(a) which states that OPM shall establish and administer the FLTCIP for which eligible individuals may obtain long term care insurance coverage. The commenter stated that the statutory construct should be interpreted to mean that OPM *must* offer eligible individuals an opportunity to enroll in the FLTCIP. Another commenter questioned OPM's authority to suspend applications for a period, as this would reduce premiums received from enrollees prevented from enrolling and therefore increase premiums for those already enrolled.

OPM disagrees with these comments and concludes that it has the authority to institute these changes to FLTCIP. OPM's authority to establish and administer the Program brings with it the obligation to oversee the Program's functioning and to protect both current and prospective enrollees, as well as the health of the Program as a whole. OPM has authority under 5 U.S.C. 9008 to prescribe regulations to effectuate this authority, including to create through regulation the ability to suspend applications for coverage, with notice and for a reasonable period of time, when necessary for the proper administration of the Program. It is also within OPM's authority

to alter through regulation the circumstances under which abbreviated underwriting may be offered. As OPM explained in the preamble of the proposed rule, the purpose of creating through regulation the ability to suspend applications is to protect eligible individuals from applying to enroll when OPM has determined that underwriting processes may need revisions or when the current premium rates offered to new applicants may not reasonably and equitably reflect the cost of the benefits as required under 5 U.S.C. 9003(b)(2). Finally, OPM acknowledges that if FLTCIP is suspended for a period this would prevent currently eligible and newly eligible individuals from applying for coverage during the suspension, and individuals may have to wait to apply after the suspension period or seek alternative coverage. As explained in the preamble of the proposed rule, the number of potential new enrollees would be small. OPM will only suspend applications when it is in the best interest of the Program, as required by this final rule.

One commenter stated that the proposed rule is arbitrary and capricious under the Administrative Procedure Act because OPM stated in the preamble that it considered the Notice of Proposed rulemaking to serve as the notice required under the proposed 5 CFR 875.110(b), which is being finalized in this final rule. OPM is clarifying that the proposed rule served as notice to the public that OPM intends to suspend FLTCIP applications and establishes the process for suspension, amends abbreviated underwriting rules, and modifies the regulations. OPM is clarifying that these actions, including the process for suspension as proposed in 5 CFR 875.110, will be effectuated after publication of the final rule, not after the proposed rule as the commenter stated.

One commenter questioned whether OPM consulted with the Secretaries of the uniformed services before promulgating the rule as required by 5 USC 9008(c). OPM fulfilled the requirement of consultation through the inter-agency review process before it published the proposed rule.

All three of the commenters expressed general concerns about the manner in which OPM administers FLTCIP. They suggested that OPM should act in a fashion similar to state insurance regulators, such as by adopting standards set by the National Association of Insurance Commissioners (NAIC) for long term care insurance rate increases, conducting public rate hearings, and taking expert and enrollee testimony. They also suggested that OPM should be more transparent in its operation of the Program, such as by making public its communications with the FLTCIP Carrier. Finally, one commenter suggested that OPM should require the FLTCIP Carrier and administrator to be more transparent regarding their operations, such as by publishing quarterly reports with information about pay-outs, expenses, reserves, and investment mix.

OPM acknowledges the importance of transparency and consumer protections for FLTCIP enrollees. OPM complies with consumer protections in the FLTCIP statute and the Health Insurance Portability and Accountability Act of 1996, including by providing a contingent benefit upon lapse, inflation protection options, portability, and guaranteed renewability (except when enrollees fail to pay their premiums). As part of contracting, OPM and the FLTCIP Carrier agree to specific requirements for the insurer to follow, including certain NAIC model standards. While OPM will consider these comments in its future administration of the Program, the comments are outside the scope of this rule and require no further response.

The Armed Services Board of Contract Appeals (ASBCA) also contacted OPM seeking clarification regarding the appropriate board of contract appeals to resolve contract disputes between OPM and the FLTCIP Carrier. The ASBCA correctly noted that although OPM's regulations currently identified the ASBCA as the board of contract appeals with jurisdiction, the National Defense Authorization Act for Fiscal Year 2006 created the Civilian Board of Contract Appeals (CBCA) and specified the jurisdiction of the ASBCA and CBCA. As an executive agency, OPM contract disputes are within the jurisdiction of the CBCA pursuant to 41 U.S.C

7105(b). OPM is making a technical correction that updates our regulations to reflect that the CBCA, not the ASBCA, will resolve contract disputes related to FLTCIP.

### **Notice of Suspension Period**

OPM will issue a separate Federal Register document announcing the beginning date and anticipated length of any suspension period at least 30 days before the suspension period starts.

### **Changes From Proposed Rule**

OPM has made a change to the final rule to clarify 5 CFR 875.110. The proposed rule included the process for suspending applications for FLTCIP coverage after publication of a document in the Federal Register. The proposed rule also included a process for extending such a suspension. The final rule clarifies that each extension to the suspension period is limited to 24 months. Each extension will be based on current information supporting OPM's conclusion that continuing the suspension is in the best interest of the Program, and each extension will require publication in the Federal Register.

OPM has made one technical correction to this final rule. This final rule clarifies in 5 CFR 875.109 that the Civilian Board of Contract Appeals has jurisdiction to resolve contract disputes related to FLTCIP. Except for the change above and this technical correction, OPM is issuing this final rule with no other changes.

### **Expected Impact of the Final Rule**

The changes in this final rule, including underwriting changes and any future suspensions of applications for FLTCIP coverage, will not affect current FLTCIP enrollees. Individuals already enrolled in FLTCIP will retain their coverage as long as they continue to pay premiums. The changes impact new enrollment and are expected to impose no more than de minimus administrative costs to Federal agencies since FLTCIP is an enrollee-pay-all program, and there is no Government contribution toward enrollee premiums.

OPM expects that the rule will not result in a significant impact on the eligible or newly eligible population. Approximately 6,000 eligible individuals enroll in FLTCIP annually, which

is less than 0.1% of 11 million eligible federal and military actives and annuitants (not including spouses and other qualified relatives who are also eligible). This low percentage mirrors the low uptake for purchasing long term care insurance (LTCI) in the broader LTC market. According to a Treasury Report of the Federal Interagency Task Force on Long-Term Care Insurance, sales of new LTCI policies have declined since the early 2000s, as numerous insurers decided to exit the market due to the poor financial performance of the product line; and low take-up rates for LTCI appear to stem in part from low demand for these products.<sup>1</sup> The report identifies factors influencing demand including: substitutes for private LTCI such as Medicaid; unpaid care or the ability to receive informal care from family; a desire to leave assets to heirs can suppress demand because people may be motivated to postpone consumption and save money; lack of information and awareness about LTC costs and the ways to finance those costs; lack of trust in insurers; and premiums, costs, and loads.<sup>2</sup>

Since less than 0.1% of the eligible population annually enroll in FLTCIP, based on this trend and market trends, it is unlikely that newly eligible individuals would have a high demand for LTCI during a suspension of applications. Further, there are other options for eligible individuals to plan for LTC needs. Some other options to plan for LTC needs during a suspension period include the following: saving for future needs by setting aside funds to invest in a 401(k), an IRA, or a non-retirement investment account; investing in a long-term care annuity; purchasing a “combination” or “hybrid” product that combines a life insurance policy with a LTC rider; or purchasing a short-term care insurance policy.

### **Indirect Effects on Other Parties**

OPM does not believe this regulation will have a large impact on the broader LTCI market. Approximately 6,000 eligible individuals enroll in FLTCIP annually, which is less than

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<sup>1</sup> U.S. Department of the Treasury, “Long-Term Care Insurance: Recommendations for Improvement of Regulation.” Report of the Federal Interagency Task Force on Long-Term Care Insurance, August 2020, <https://home.treasury.gov/system/files/136/Report-Federal-Interagency-Task-Force-Long-TermCare-Insurance.pdf>.

<sup>2</sup> See footnote 1.

0.1% of the eligible population. At an average premium of \$125 per month or \$1,500 per year, the forgone annual premium for new enrollees would total less than \$10 million per year during any FLTCIP enrollment suspension. As discussed above, affected individuals would likely pursue substitute savings and insurance products during a suspension period. OPM estimates that the magnitude of the forgone \$10 million on other parties, such as LTC insurers in the LTCI market, would be quite small compared to the larger LTCI market.

### **Benefits of the Final Rule**

This final rule establishes provisions for OPM to suspend applications to FLTCIP when it is in the best interest of the program; for example, in order to allow for adjustment to underwriting processes or to reprice premium rates after a review of actuarial assumptions. The rule aims to protect eligible individuals from applying to enroll when it has been determined that underwriting processes may need revisions or when the current premium rates may not reflect the cost of the benefits provided due to market volatility and changes to projections about future costs. This allows OPM and the FLTCIP carrier to agree on underwriting changes or new premium rates that reasonably and equitably reflect the cost of the benefits provided as required by the FLTCIP statute.

### **Executive Orders 12866 and 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits and of reducing costs, harmonizing rules, and promoting flexibility. This rule has been designated as a significant, but not economically significant, regulatory action under Executive Order 12866.

### **Congressional Review Act**

This rule is not a major rule under 5 U.S.C. 804(2). Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (codified at 5 U.S.C. 801–808), also known as the Congressional Review Act or CRA, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. A major rule under the CRA cannot take effect until 60 days after it is published in the Federal Register.

### **Paperwork Reduction Act**

Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number.

### **Regulatory Flexibility Act**

I certify that this regulation will not have a significant economic impact on a substantial number of small entities.

### **Federalism**

We have examined this rule in accordance with Executive Order 13132, Federalism, and have determined that this rule will not have any negative impact on the rights, roles, and responsibilities of State, local, or tribal governments.

### **List of Subjects in 5 CFR Part 875**

Administration and general provisions, Eligibility, Cost, and Coverage.

Office of Personnel Management.

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Stephen Hickman,

Federal Register Liaison.



Accordingly, OPM amends 5 CFR part 875 as follows:

**Part 875—FEDERAL LONG TERM CARE INSURANCE PROGRAM**

- 1. The authority citation for part 875 continues to read as follows:

Authority: 5 U.S.C. 9008; Pub. L. 116–92, 133 Stat. 1198 (5 U.S.C. 8956 note).

**Subpart A—Administration and General Provisions**

- 2. Amend § 875.101 by revising the definitions of “Carrier”, “Eligible individual”, and “Free look” and adding in alphabetical order a definition for “Special application period” to read as follows:

**§ 875.101 Definitions.**

\* \* \* \* \*

*Carrier* means a “qualified carrier” as defined in section 9001 of title 5, United States Code, with which OPM has contracted to provide long term care insurance coverage under this section. A Carrier may designate one or more administrators to perform some of its obligations.

\* \* \* \* \*

*Eligible individual* means an employee, annuitant, member of the uniformed services, retired member of the uniformed services or qualified relative, as defined in section 9001 of title 5, United States Code.

\* \* \* \* \*

*Free look* means that within 30 days after you are approved for coverage and receive the Benefit Booklet, you may cancel that coverage if you are not satisfied with it and receive a refund of any premium you paid for that coverage. It will be as if the coverage was never issued.

\* \* \* \* \*

*Special application period* is a period in which active workforce members and their spouses may apply based on abbreviated underwriting. Such application periods will be provided for pursuant to OPM’s authority in section 9008 of title 5, United States Code.

\* \* \* \* \*

- 3. Revise § 875.102 to read as follows:

**§ 875.102 Where do I send benefit claims?**

You must submit your benefit claims to the FLTCIP Carrier.

- 4. Amend § 875.107 by removing “and” at the end of paragraph (b), removing the semicolon and adding a period at the end of paragraph (c) and adding a semicolon in its place, and adding paragraphs (d) and (e).

The additions read as follows:

**§ 875.107 What are OPM's responsibilities as regulator under this Program?**

\* \* \* \* \*

(d) Suspending applications for FLTCIP coverage, including coverage increases as specified in § 875.110; and

(e) Holding special application periods as specified in § 875.402.

- 5. Revise § 875.109 to read as follows:

**§ 875.109 Which board of contract appeals has jurisdiction for resolving contract disputes between OPM and the Carrier?**

For purposes of applying chapter 71 of title 41 to disputes arising between OPM and the Carrier, the Civilian Board of Contract Appeals has jurisdiction to decide an appeal relative to such a dispute.

- 6. Add § 875.110 to read as follows:

**§ 875.110 May OPM suspend applications for FLTCIP coverage?**

(a) OPM may suspend applications for FLTCIP coverage, including coverage increases, when OPM determines that a suspension is in the best interest of the Program.

(b) OPM will issue a document in the Federal Register with the effective date of the suspension period, during which no applications for FLTCIP coverage will be accepted. The

effective date will be determined at the discretion of the Director and will be at least 30 days after the publication date of the document.

(c) The duration of the suspension period, as determined at the discretion of the Director and not to exceed 24 months unless subsequently extended, will be announced in a document published in the Federal Register.

(d) At least 30 days before the end of the suspension period, OPM may issue a document in the Federal Register announcing an extension of the suspension period when OPM determines that such extension is in the best interest of the Program. The duration of any extension to the suspension period will not exceed 24 months, unless subsequently extended by additional periods of suspension, each not to exceed 24 months.

#### **Subpart B—Eligibility**

- 7. Revise § 875.203 to read as follows:

#### **§ 875.203 Am I eligible if I separated under the FERS MRA+10 provision?**

If you have separated from service under the FERS Minimum Retirement Age and 10 years of service (MRA+10) provision of 5 U.S.C. 8412(g), and have postponed receiving an annuity under that provision, you are eligible to apply for coverage as an annuitant under this part.

- 8. Amend § 875.204 by revising paragraph (c) to read as follows:

#### **§ 875.204 Am I eligible as a member of the uniformed services?**

\* \* \* \* \*

(c) You are not eligible to apply for coverage solely because you belong to the Individual Ready Reserve. The Individual Ready Reserves includes Reservists who are assigned to a Voluntary Training Unit in the Naval Reserve and Category E in the Air Force Reserve.

#### **§ 875.206 [Removed and Reserved]**

- 9. Remove and reserve § 875.206.

- 10. Revise § 875.207 to read as follows:

**§ 875.207 What happens if I am in nonpay status during a special application period?**

(a) If you return to pay status from nonpay status during a special application period, you have 60 days from the date of your return, or until the end of the special application period, whichever gives you more time, to apply for coverage pursuant to the rules of that special application period.

(b) If you return to pay status from nonpay status within 180 days after the end of the special application period, you have 60 days from the date of your return to apply for coverage pursuant to the rules of that special application period.

(c) Paragraphs (a) and (b) of this section apply only when you have been in nonpay status for more than one-half of a special application period, unless you went into nonpay status for a reason beyond your control.

- 11. Amend § 875.209 by revising paragraph (a) to read as follows:

**§ 875.209 How do I demonstrate that I am eligible to apply for coverage?**

(a) When you submit your application for coverage, you must make known your status as a member of an eligible group. If you are a qualified relative, you need to provide identifying information about the workforce member who makes you an eligible individual.

\* \* \* \* \*

- 12. Amend § 875.210 by revising paragraph (b)(1) to read as follows:

**§ 875.210 What happens if I become ineligible after I submit an application?**

\* \* \* \* \*

(b) \* \* \*

(1) When you are involuntarily separated from Federal civilian service (except for misconduct) or from the uniformed services (except for a dishonorable discharge); or, when you

are the qualified relative of a workforce member who has been involuntarily separated from Federal civilian service (except for misconduct) or from the uniformed services (except for a dishonorable discharge).

\* \* \* \* \*

- 13. Revise § 875.211 to read as follows:

**§ 875.211 What happens if my eligibility status changes after I submit my application?**

(a) If you applied as an active workforce member, and you retire or separate from service after you submit an application for coverage, but before your coverage becomes effective, you must notify the Carrier of this change.

(b) If you applied with abbreviated underwriting during a special application period as an active workforce member or the spouse of an active workforce member, and the active workforce member retires or separates from service before your coverage becomes effective, you must reapply based on your new eligibility status.

- 14. Revise § 875.213 to read as follows:

**§ 875.213 May I apply as a qualified relative if I am the domestic partner of an employee or annuitant?**

You may apply for coverage as a qualified relative if you are a domestic partner, as described in § 875.101. As prescribed by OPM, you will be required to provide documentation to demonstrate that you meet these requirements, and you must submit to full underwriting requirements. However, as explained in § 875.210, if you lose your status as a domestic partner, and therefore status as a qualified relative, before your coverage goes into effect, you are no longer eligible for FLTCIP coverage.

**Subpart D—Coverage**

- 15. Revise § 875.401 to read as follows:

**§ 875.401 How do I apply for coverage?**

To apply for coverage, you must complete the application in a form appropriate for your eligibility status as prescribed by the Carrier and approved by OPM.

- 16. Revise § 875.402 to read as follows:

**§ 875.402 When will open seasons be held?**

(a) There are no regularly scheduled open seasons for long term care insurance. OPM may have special application periods in which active workforce members and their spouses may apply based on abbreviated underwriting.

(b) In situations where OPM determines that it is appropriate to have a special application period, OPM will announce any such period via publication of a document in the Federal Register. The document will include the requirements for eligible applicants during the special application period.

- 17. Revise § 875.403 to read as follows:

**§ 875.403 When may I apply for coverage?**

If you are an eligible individual, you may apply at any time outside of a suspension period described in § 875.110. You will be subject to full underwriting requirements. The only exceptions to the full underwriting requirements are described in §875.402. You may apply as a qualified relative of a workforce member even if the workforce member does not apply for coverage.

- 18. Revise § 875.404 to read as follows:

**§ 875.404 What is the effective date of coverage?**

(a) (1) The effective dates of coverage under special application period enrollments will be announced in a document published in the Federal Register that announces special application period dates.

(2) If you are an active workforce member or the spouse of an active workforce member and you are applying for coverage during a special application period, the workforce member

must be actively at work at least 1 day during the calendar week immediately before the week which contains your coverage effective date for your coverage to become effective. You must inform the Carrier if you do not meet this requirement. In the event you do not meet this requirement, the Carrier will issue you a revised effective date, which will be the 1st day of the next month. The workforce member also must meet the actively at work requirement for any revised effective date for coverage to become effective, or you will be issued another revised effective date in the same manner.

(b) If you enroll at any time outside of a special application period, your coverage effective date is the 1st day of the month after the date your application is approved.

- 19. Revise § 875.405 to read as follows:

**§ 875.405 May a spouse, domestic partner, or other qualified relative of a workforce member apply for coverage?**

A spouse, domestic partner, or other qualified relative of a workforce member may apply for coverage with full underwriting at any time following the marriage or commencing date of the domestic partnership, outside of a suspension period as described in § 875.110.

- 20. Amend § 875.406 by revising paragraph (a)(1) to read as follows:

**§ 875.406 May I change my coverage?**

(a) \* \* \*

(1) At any time outside of a suspension period described in § 875.110, you may apply to increase your coverage with full underwriting.

\* \* \* \* \*

- 21. Revise § 875.410 to read as follows:

**§ 875.410 May I continue my coverage when I leave Federal or military service?**

If you are an active workforce member, your coverage will automatically continue when you leave active service, as long as the Carrier continues to receive the required premium when due.

- 22. Revise § 875.413 to read as follows:

**§875.413 Is it possible to have coverage reinstated?**

(a) Under certain circumstances, your coverage can be reinstated. The Carrier will reinstate your coverage if it receives proof satisfactory to it, within 6 months from the date of the written notice of termination, that you suffered from a cognitive impairment or loss of functional capacity, before the grace period ended, that caused you to miss making premium payments. In that event, you will not be required to submit to underwriting. Your coverage will be reinstated retroactively to the termination date but you must pay back premiums for that period. The premium will be the same as it was prior to termination.

(b) If your coverage has terminated because you did not pay premiums or because you requested cancellation, the Carrier may reinstate your coverage within 12 months from the date of the written notice of termination at your request. You will be required to reapply based on full underwriting, and the Carrier will determine whether you are still insurable. If you are insurable, your coverage will be reinstated retroactively to the termination date and you must pay back premiums for that period. The premium will be the same as it was prior to termination.